IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 15TH OCTOBER 2007 / 23RD ASWINA 1929

RSA.No. 348 of 2007()

AS.10/2002 of SUB COURT, KOYILANDY
OS.30/2000 of MUNSIFF-MAGISTRATE COURT, PAYYOLI

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: APPELLANT/APPELLANT/PLAINTIFF.

VAZHAKKALIL PREMALATHA,
D/O. KRISHNAN, KOLANGAROTH HOUSE, CHORODE AMSOM,
DESOM, VADAKARA TALUK.

BY ADV. SRI.R.PARTHASARATHY

RESPONDENT: RESPONDENT/DEFENDANT.

KUNNUMMAL ASOKAN,
S/O. KANARAN, IRINGAL AMSOM, DESOM,
KOYILANDY TALUK.

BY ADV. SRI.MOHANAN V.T.K.

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 15/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 348 OF 2007

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Dated this the 15th day of October, 2007

JUDGMENT

Plaintiff in O.S.30/2000 before Munsiff-Magistrate Court, Payyoli is the appellant. Defendant is the respondent. Appellant instituted the suit seeking a decree for permanent prohibitory injunction contending that as per Ext.A2 assignment deed dated 13.6.1997 he purchased plaint schedule property and since then he has been in exclusive possession and enjoyment of the property and appellant has been residing at Ernakulam and on her behalf her brother was looking after the property and on 26.1.2001 her brother along with the workers went to the property for plucking coconuts respondent demanded to reassign the property and obstructed plucking of coconuts contending that he has no right to do so. The suit was instituted seeking a decree for permanent prohibitory injunction. Respondent in the written statement

contended that appellant is not in possession of the property and the property is in his possession and he is taking the income and he has been in possession and enjoyment of the property. It was also contended that within the plaint schedule property there is his residential house, cattle shed and other appurtenant structure and he was forced to execute Ext.A2 as the father and brothers of the appellant was conducting a kuri business in the name and style as "Dinesh Bank" and respondent obtained a loan of Rs.2,00,000/- and he repaid Rs.1.5 lakhs and for the balance of Rs.50,000/- they insisted for security and Ext.A2 sale deed was executed only as security and he did not receive the consideration shown therein and he has subsequently repaid Rs.45,000/- and inspite of the demand, property was not reconveyed and appellant is therefore not entitled to the decree sought for.

2.Learned Munsiff framed the issues regarding the actual physical possession of plaint schedule property and whether appellant is entitled to the decree for injunction sought for. On the evidence of PW, Dws. 1 to 4, Exts.A1 to A6 and B1 to B3,

learned Munsiff found that though Ext.A2 shows that appellant purchased the property, she did not establish her possession as evidence establish that within the plaint schedule property respondent is residing and appellant is not entitled to the decree sought for. Appellant challenged the decree and judgment befor Sub Court, Koyilandy in A.S.10/2002. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel is that courts below did not properly appreciate the evidence and when under Ext.A2, the property was assigned by respondent in favour of appellant and appellant established his title and possession, courts below should have granted the decree sought for. Learned counsel pointed out that under Ext.A2 it was specifically mentioned that the building is not included within the property transferred and at the time of evidence appellant did claim the decree

only in respect of the balance extent excluding the building and in such circumstance, courts below were not justified in denying the decree for injunction sought for. Learned counsel further argued that even without a specific issue, trial court has found that Ext.A2 is sham and nominal document and that finding was uncalled for in a suit for injunction and in view of the finding the appeal may be admitted.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal.

6. Suit is only for injunction simpliciter. The question to be decided is whether appellant has been in possession of plaint schedule property on the date of institution of the suit and if so, whether she is entitled to the decree sought for. As rightly found by courts below even if she has title under Ext.A2, if appellant could not establish her possession, she is not entitled to the decree sought for. True Ext.A2 shows that plaint schedule property was assigned by respondent in favour of appellant. What was contended by

respondent was that he had availed a loan from a financial institution run by brothers of appellant and towards the security of that loan he was forced to execute Ext.A2 sale deed and it was not intended to be sale deed but only as security. Anyway, no decree for declaration of title was sought for and courts below did not frame any issue on the question whether Ext.A2 was a sham and nominal document and whether appellant has title to the plaint schedule property under Ext.A2. The only issue framed was regarding possession, as the suit is only for injunction.

7. At the time of evidence it was not disputed that plaint schedule property takes in a residential building and the appurtenant structure including the cattle shed. Though there is a statement in Ext.A2 that the property assigned does not include any building, Ext.A2 does not show that what was assigned thereunder is a property excluding the building therein. There is an occean of difference between the two. When Ext.A2 shows that property so assigned does not include a building and the property covered by the document

within the boundaries admittedly contain the residential building of respondent, it is not open to the appellant to contend that what was assigned is the property excluding the building. If that be the case, there would have been a specific recital in Ext.A2 that though the property assigned thereunder includes a residential building, the property assigned is excluding that building and the way leading to that building. But Ext.A2 shows that the recital is only that the property assigned does not contain any building which is contrary to the admitted facts. It is in such circumstance, courts below found that appellant has not established her possession of the plaint schedule property, as admittedly respondent is residing within the plaint schedule property. That factual finding cannot be interfered in exercise of the powers of this court under section 100 of Code of Civil Procedure. When appellant did not establish that she has been in possession of the plaint schedule property, no decree for injunction could be granted, as rightly found by the courts below. In such circumstance, appeal is only to be

dismissed. But there is force in the submission of learned counsel that the finding that Ext.A2 is a sham and nominal document was not warranted, in the absence of an appropriate issue framed in the suit when suit is only for injunction. It is made clear that the said observation of the trial court will not disentitle appellant from instituting a fresh suit on the strength of Ext.A2, establishing her title.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006